

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LOOPS, LLC, a Delaware limited liability
company, et al.,

Plaintiffs,

v.

PHOENIX TRADING, INC., dba
AMERCARE PRODUCTS, INC., a
Washington corporation, et al.,

Defendants.

CASE NO. C08-1064 RSM

ORDER GRANTING AMERCARE
DEFENDANTS' MOTION FOR
PARTIAL SUMMARY
JUDGMENT

I. INTRODUCTION

This matter comes before the Court on the motion for partial summary judgment brought by Defendants Phoenix Trading, Inc. ("Amercare"), Wendy Hemming, and Jeffrey Hemming (collectively "Defendants" or "Amercare Defendants"). (Dkt. #153). Plaintiffs Loops, LLC and Loops Flexbrush, LLC (collectively "Loops") allege in this action that Amercare fraudulently obtained a sample of the patented Loops Flexbrush, sent the sample to China to be copied, and sold the infringing copies at a low price, outbidding Loops on a supply contract. Loops brings claims for patent infringement, violations of the Lanham Act, unfair competition under Washington common law, violations of the Washington Consumer Protection Act, and fraud. Defendants seek summary judgment declaring that Loops is not entitled to monetary

1 relief on its patent infringement claim and not entitled to any relief on all other claims. The
2 Court has reviewed the parties' briefs including supplemental briefing regarding Loops's fraud
3 claim and has decided this motion is appropriate for disposition without oral argument.
4 Because the Court finds no dispute of material fact, the Court grants the motion in its entirety.¹

5 6 **II. FACTS**

7 Steven Kayser is the inventor of the Loops Flexbrush, a small flexible handle toothbrush
8 designed for safe use in prisons. The Flexbrush comes in 4.25 inch and 3 inch sizes. It is made
9 of flexible material, allowing the toothbrush to be bent in half or twisted into a spiral without
10 breaking. The Flexbrush is well-suited for use in correctional facilities because its soft handle
11 cannot be fashioned into a shank. Kayser is the founder of Plaintiffs Loops LLC and Loops
12 Flexbrush LLC and has assigned his relevant intellectual property rights to those companies.
13 Loops also sells prison-safe dental floss.

14 Amercare is a Washington corporation that imports a wide variety of health and toiletry
15 items such as toothbrushes, shampoo, and soap, and resells them to customers, including
16 prisons. Defendant Wendy Hemming ("Hemming") is the majority shareholder and president
17 of Amercare. Her husband, Defendant Jeffrey Hemming, was at various times relevant to this
18 lawsuit a minority shareholder, officer, and employee of Amercare.

19 On January 13, 2006, Hemming telephoned Kayser requesting that Loops provide her
20 with price quotations for Loops' dental floss for one of Amercare's clients. She also requested
21 that Loops provide her with samples of all its products, including the Loops Flexbrush. Loops
22 sent samples of its 4.25 inch toothbrush in the colors blue and white.

23 Approximately two weeks later, Hemming contacted Loops to order Loops's dental floss
24 to distribute to her customers. During the next year, she continued to order floss periodically,
25 placing six orders with Loops between January 26, 2006 and January 23, 2007.

26
27 ¹ Defendants' motion is titled a motion for summary judgment, but in fact it
28 is a motion for partial summary judgment as it does not seek to dismiss
Plaintiffs' claim for patent infringement in its entirety. It only seeks to
limit the available remedies for that claim.

1 In May 2006, Amercare placed a bid with the New York City Department of Corrections
2 (“NYC-DOC”) to supply Loops Flexbrush toothbrushes. The bid sheet Amercare submitted
3 stated that Amercare was the bidder and that it was offering to supply “Loops Flexbrush.”
4 Loops was not aware that Amercare submitted this bid, nor had Loops agreed to sell Amercare
5 its Loops Flexbrush or allow Amercare to distribute it. Amercare did not win its 2006 bid and
6 consequently never sold any Loops Flexbrushes to NYC-DOC. Between August 2006 and
7 June 2007, NYC-DOC purchased Loops Flexbrushes from Loops.

8 On January 23, 2007, Hemming and Kayser had another telephone conversation.
9 Hemming informed Kayser that she wished to sell the Loops Flexbrush and she would like
10 Loops to “give” all of its flexible handle toothbrush contracts, including its NYC-DOC
11 contract, to Amercare so that Amercare could be a reseller or distributor of the Loops
12 Flexbrush. Kayser believed that to allow Amercare to be a reseller would constitute “bid
13 rigging” or “collusion” and refused. Hemming requested that Loops provide additional
14 samples of the Loops Flexbrush. On January 26, 2007, Kayser and Hemming met in person at
15 Amercare’s offices. Hemming again requested that Loops allow Amercare to service its
16 contracts and resell its Flexbrush, and Kayser again refused.

17 In February 2007, Loops sent Amercare additional samples of its Flexbrush toothbrush
18 in response to Amercare’s earlier request. These samples were semi-transparent or clear; they
19 were not blue.

20 Sometime in the early months of 2007, NYC Department of Administrative Services
21 decided to put the NYC-DOC toothbrush contract up for bid. Loops provided product
22 specification sheets, information regarding the material composition of its toothbrushes, and
23 samples of its Flexbrush to NYC-DOC. NYC-DOC published bid documents seeking a
24 “Loops Flexbrush # FBM 02 or equal” for the period August 30, 2007 to November 29, 2010.

25 On April 23, 2007, Hemming made one last attempt to convince Kayser to allow
26 Amercare to service Loops’s contracts. Hemming admits that before the meeting began, she
27 intended that if the negotiation failed, she would send the samples of the Loops Flexbrush to
28 China to have them copied and would use those copies to bid against Loops for the NYC-DOC

1 contract. She did not reveal this intention to Kayser. Kayser did refuse Hemming's offer, and
2 Hemming carried out her plan. Immediately following that conversation, Hemming sent
3 samples of the Loops Flexbrush to Mr. Lai in Taiwan to have them copied by a Chinese
4 manufacturer.² Hemming was familiar with the price Loops would charge Amercare for
5 Flexbrushes and intended to bid lower than that amount to beat Loops's bid. According to
6 Hemming, the Flexbrush sample she sent to China was blue, meaning that it was from the
7 batch of samples provided in 2006. Molds for manufacturing the copied toothbrushes were
8 ordered in May and June 2007.

9 On April 24, 2007, Amercare submitted a bid to NYC-DOC. The bid document stated
10 that Amercare was willing to provide the "Amerfresh Soft Handle = Equal to Loops FBM02"
11 made by "Amercare Products, Inc." The Amerfresh Soft Handle, manufactured in China, is an
12 identical copy of the blue Loops Flexbrush in every respect except one. Whereas the words
13 "LoopS™ Flexbrush™" are embossed in raised lettering on the back side of the head of the
14 Loops Flexbrush (opposite the bristles), the name "AmerCare" is embossed on the Amerfresh
15 toothbrush in the same place and in the same font.

16 Having the lowest bid, Amercare won the contract to provide flexible toothbrushes to
17 NYC-DOC. Amercare's bid was more than 60% lower than Loops's bid. There were no other
18 qualified bidders. Amercare provided NYC-DOC with Amerfresh Soft Handle toothbrushes
19 from October 31, 2007 to May 22, 2008.

20 Loops submitted its patent application for the Loops Flexbrush in August 2004. The
21 patent, number 7,334,286 B2 ("286 patent") did not issue until February 26, 2008. The
22 Loops Flexbrush does not have, and never has had, any markings on the toothbrush itself
23 indicating that it is patented or that a patent is pending. At all times prior to September 2008,
24 the disposable plastic packaging on each individual Flexbrush, including the samples given to
25 Amercare, indicated "patent pending." Flexbrushes with packaging listing the product's patent

26 ² Loops contends that there is a factual dispute regarding whether Hemming
27 sent samples of the Loops Flexbrush to Mr. Lai to be copied in 2006, after
28 receiving the first batch of samples, rather than 2007, after her April
conversation with Kayser. This contention is meritless as explained in
section III.E *infra*.

1 number did not enter the United States until September 12, 2008, months after Amercare's last
2 sale to NYC-DOC. Loops sent Amercare a notice of its pending patent application on
3 November 17, 2007. It did not send Amercare a notice that its patent issued until June 13,
4 2008, after Amercare's last shipment to NYC-DOC.

5 In an earlier decision this Court held that Amercare lost, destroyed, or withheld relevant
6 documents regarding its transactions with Chinese entities and ordered that Plaintiffs be given
7 an adverse inference instruction. (Dkt. #152). The missing documents include invoices,
8 purchase orders, and e-mails between Amercare and its Chinese or Taiwanese contacts. In
9 deciding whether there is a genuine dispute of material fact for purposes of summary judgment,
10 the Court must take into account that the jury may infer that the evidence made unavailable by
11 Amercare is unfavorable to it. The effect of this instruction on this summary judgment motion
12 is discussed in section III.E *infra* as it specifically pertains to Loops's fraud claim.

13 14 **III. MOTIONS TO STRIKE**

15 The parties make various motions to strike. First, Loops moves to strike the declaration
16 of Mark Hubert. Mr. Hubert, an attorney, testified in his declaration to various legal
17 conclusions concerning the similarity between the published Loops Flexbrush patent
18 application and the issued patent. He was not disclosed as an expert, nor would he have been
19 permitted to give expert testimony even if properly disclosed because his testimony, consisting
20 solely of legal conclusions, is not helpful to the trier of fact. *See* Fed. R. Evid. 702.

21 Essentially, Mr. Hubert's declaration is additional attorney argument on a pure issue of law.
22 Additionally, Defendants assert that "Defendants have never intended to call Mark Hubert at
23 trial." (Dkt. #181 at 9). Evidence that will not be produced at trial has no bearing on a
24 summary judgment motion. Accordingly, the motion to strike is granted.

25 Secondly, the Court grants Loops's motion to strike paragraph 12 of the Klingbiel
26 Declaration and paragraph 54 of the Rappaport Report. Paragraph 54 consists entirely of legal
27 conclusions that are for the Court to decide.
28

1 Third, Loops moves to strike paragraph 19 of Hemming's declaration in which she states
2 that "Jeffrey Hemming was not involved in any material way in the conduct or activities
3 alleged in [this case]." The motion is denied. However, the statement is of course limited to
4 Ms. Hemming's personal knowledge. In other words, as far as Ms. Hemming is aware, Jeffrey
5 Hemming was not involved in the events giving rise to this case.

6 Defendants make their own motions to strike language and arguments from Plaintiffs'
7 briefing on the grounds that they are irrelevant or prejudicial. For example, Defendants move
8 to strike all reference to "bid rigging" or "collusion" because these allegations are a "red
9 herring" not relevant to this case. Objections based on relevance or prejudice are of no
10 moment on a motion for summary judgment. No jury is reading the parties' briefs. The Court
11 can decide for itself which arguments or evidence are relevant and give each the weight it
12 deserves. Accordingly, Defendants' motions to strike "bid rigging" and "collusion," in
13 reference to the three inch Flexbrush, and use of the word "counterfeit" are denied.

14 15 **IV. DISCUSSION**

16 Summary judgment is appropriate where "the pleadings, the discovery and disclosure
17 materials on file, and any affidavits show that there is no genuine issue as to any material fact
18 and that the movant is entitled to judgment as a matter of law." FRCP 56(c); *Anderson v.*
19 *Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). The Court must draw all reasonable inferences
20 in favor of the non-moving party. *See F.D.I.C. v. O'Melveny & Meyers*, 969 F.2d 744, 747
21 (9th Cir. 1992), *rev'd on other grounds*, 512 U.S. 79 (1994). Mere disagreement, or the bald
22 assertion that a genuine issue of material fact exists, does not preclude the use of summary
23 judgment. *See Coverdell v. Dept. of Social and Health Servs.*, 834 F.2d 758, 769 (9th Cir.
24 1987). Genuine factual issues are those for which the evidence is such that "a reasonable jury
25 could return a verdict for the non-moving party." *Anderson*, 477 U.S. at 248.

26 27 **A. Patent Infringement Damages – Marking**

28

1 Amercare first contends that, as a matter of law, Loops cannot recover patent
2 infringement damages because it failed to mark its products in compliance with the marking
3 provisions of the Patent Act. The relevant provision of the Patent Act provides:

4
5 Patentees . . . may give notice to the public that the same is patented, either by
6 fixing thereon the word “patent” or the abbreviation “pat.”, together with the
7 number of the patent, or when, from the character of the article, this can not be
8 done, by fixing to it, or to the package wherein one or more of them is contained,
9 a label containing a like notice. In the event of failure so to mark, no damages
10 shall be recovered by the patentee in any action for infringement, except on proof
11 that the infringer was notified of the infringement and continued to infringe
thereafter, in which event damages may be recovered only for infringement
occurring after such notice. Filing of an action for infringement shall constitute
such notice.

35 U.S.C.A. § 287.

12 It is undisputed that the Loops Flexbrush itself was never marked with the word
13 “patent” or the abbreviation “pat” together with the patent number. The parties
14 dispute at great length in their briefs whether such marking would have been
15 impossible or impractical based on the size of the toothbrush and the cost of recreating
16 the molds to mark the toothbrush with intellectual property rights. However, the Court
17 need not decide the issue. Even if the “character of the article” makes it impractical to
18 properly mark it, the statute requires that proper markings be fixed “to the package
19 wherein one or more of [the toothbrushes] is contained.” 35 U.S.C. § 287. It is
20 undisputed that Loops did not mark the packaging of its Flexbrush with the patent
21 number until September 2008. Prior to that, the packaging only stated “patent
22 pending.” Since all of Amercare’s importation and sales of its Amerfresh Soft Handle
23 toothbrush occurred on or prior to May 22, 2008, long before the Loops Flexbrush was
24 properly marked, section 287 bars Loops from recovering infringement damages
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1 unless “the infringer was notified of the infringement and continued to infringe
2 thereafter.” *Id.*

3 It is also undisputed that Loops did not notify Amercare of its infringement prior
4 to the last sale of the Amerfresh toothbrush. Loops did not send Amercare a letter
5 notifying Amercare that its patent had issued until June 2008³ and did not file this
6 action until July 2008. It is irrelevant to the notice or marking inquiry whether the
7 defendant knew of the patent or knew of his own infringement. *Amsted Indus., Inc. v.*
8 *Buckeye Steel Castings Co.*, 24 F.3d 178, 187 (Fed. Cir. 1994). Accordingly, as a
9 matter of law, Plaintiffs cannot recover infringement damages in this case.
10

11 Plaintiffs attempt to avoid this result by arguing that the Loops Flexbrushes
12 imported and sold in the United States after February 26, 2008, when the patent issued,
13 were marked on their packaging only with “patent pending” because they were
14 residual inventory from a manufacturing order placed prior to the issuance of the
15 patent. Thus Loops argues the packaging of these toothbrushes were “properly
16 marked.” (Dkt. #170 at 20). This argument is misplaced. It is of no moment, as far as
17 section 287 is concerned, why Plaintiffs failed to properly mark their product. The
18 statute is clear that if neither the product nor packaging is marked with the patent
19 number, no damages are available.
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26 ³ It is also doubtful that the June 2008 letter was sufficient to provide
27 actual notice because it did not specifically identify the activity Loops
28 believed to be infringing. See *SRI Int’l, Inc. v. Advanced Technology
Laboratories, Inc.*, 127 F.3d 1462, 1470 (Fed. Cir. 1997) (actual notice
requirement is satisfied when recipient is informed of the identity of the
patent and the activity that is believed to be an infringement).

B. Reasonable Royalty Under § 154(d)

While generally a plaintiff can only recover damages for acts of infringement after the issuance of the patent, 35 U.S.C. § 154(d) provides an exception. That provision provides that once a patent has issued, the patent includes the right to obtain a reasonable royalty from any person who infringes the patent between the date the patent application was published and the date the patent issued if certain conditions are met. Those conditions include: (1) the alleged infringer must have actual notice of the published patent application, and (2) the invention as claimed in the patent must be “substantially identical” to the invention as claimed in the published patent application. 35 U.S.C. § 154(d)(1)-(2).

The Amercare Defendants argue that the invention claimed in the patent application is not substantially identical to the invention claimed in the issued Loops Flexbrush patent. Loops does not provide any argument or authority that the two sets of claims are substantially identical. Instead, it simply states in its brief, “Defendants rely solely on an inadmissible expert opinion from counsel for the Defendants. Because the expert opinion from counsel for Defendants is inadmissible, Defendants have failed to meet their burden of proof as to this cause of action.” (Dkt. #170 at 18). Although the Court agrees with Plaintiffs that the declaration of Mark Hubert is inadmissible, Plaintiffs’ argument fails because it improperly shifts the burden of persuasion to Defendants. It is Plaintiffs’ burden, as the party seeking damages, to prove the claims are substantially identical.

Despite the absence of argument, Plaintiffs have provided both the published patent application and the issued patent for this Court’s review, allowing the Court to

1 decide the issue. The term “substantially identical” as used in the statute means that
 2 they are substantively the same. *Laitram Corp. v. NEC Corp.*, 163 F.3d 1342, 1346
 3 (Fed. Cir. 1998).⁴ This is a question of law. *Id.* at 1347 (citing *Markman v. Westview*
 4 *Instruments, Inc.*, 52 F.3d 946, 970-71 (Fed. Cir. 1995) (en banc)). The court must
 5 determine whether “the *scope* of the claims are identical, not merely whether different
 6 words are used.” *Id.* at 1346 (emphasis in original).

8 In this case, no claim in the issued patent is substantially identical to the
 9 corresponding claim in the published patent application. Each independent claim in
 10 the issued patent contains at least three limitations that the patent application claims do
 11 not.⁵ Indeed the independent claims in the 2006 patent application only vaguely
 12 resemble the claims in the 2008 approved patent. They are far from “substantially
 13 identical.” *Compare* Kayser Declaration Ex. 11 *with* Kayser Declaration Ex. 27 (Dkt.
 14 #s 172-173). Accordingly, Plaintiffs cannot recover a reasonable royalty.

17 C. Lanham Act Claim

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 19 Next, Loops contends that Defendants violated the Lanham Act by using a false
 20 designation of origin, palming off their products as Loops’s products. “Passing off (or

21 ⁴ The Federal Circuit in *Laitram* was interpreting 35 U.S.C. § 252, which gives
 22 a patentee certain rights if an original patent and reissued patent are
 23 “substantially identical.” The term “substantially identical” has the same
 meaning in both sections of the patent act. *See Pandora Jewelry, LLC v.*
Chamilia, LLC, 2008 WL 3307156 (D. Md.).

24 ⁵ (1) that the bristles have “a length substantially the same as the width of
 the group of bristles on the bottom side”; (2) that the handle includes “a
 25 narrowed elongated intermediate smooth continuous portion being composed of
 the pliable flexible material to be limber in its unstressed condition, and
 26 integrally connecting the enlarged head portion and the enlarged handle end
 portion substantially midway therebetween to facilitate flexing of the
 toothbrush with one hand of an adult user for stressing the pliable flexible
 27 material to rigidify the body for teeth brushing purposes; and (3) “wherein
 the material of the body [of the handle portion] is sufficiently flexible to
 28 enable the manually applied external force to flex the handle portion into a
 smoothly rounded shape.”

1 palming off, as it is sometimes called) occurs when a producer misrepresents his own
2 goods or services as someone else's." *Dastar Corp. v. Twentieth Century Fox Film*
3 *Corp.*, 539 U.S. 23, 28 n.1 (2003). The elements of a false designation of origin claim
4 are: (1) the defendant used a false designation of origin; (2) in interstate commerce; (3)
5 in connection with goods or services; (4) the false designation is likely to cause
6 confusion, mistake or deception as to the origin, sponsorship, or approval of the
7 defendant's goods; and (5) the plaintiff has been or is likely to be injured by these acts.
8 *Summit Technology, Inc. v. High-Line Medical Instrument Co.*, 933 F. Supp. 918, 928
9 (C.D. Cal. 1996); *see* 15 U.S.C. § 1125(a).

11 Loops describes the factual basis of its claim as follows: "In June 2006,
12 unbeknownst to Plaintiffs, Defendants bid on a contract to supply the [NYC-DOC]
13 with Loops Flexbrush toothbrushes. Plaintiffs did not have notice, did not provide
14 their approval or consent to Amercare to bid on the contract, and did not have any
15 agreement to supply Amercare with Loops Flexbrush toothbrushes to NYC-DOC. As
16 a result, Amercare bid Loops Flexbrush toothbrushes with the intent to supply the
17 toothbrushes directly." (Response Brief, Dkt. #170 at 26).⁶

20 This is insufficient to support a violation of the Lanham Act. Crediting Loops's
21 version of the facts, the evidence merely shows that Amercare offered to provide the
22 Loops Flexbrush to NYC-DOC in 2006 when, in fact, it had no ability to do so
23 because Loops had not agreed to allow Amercare to distribute its products. There is
24 no evidence that Amercare ever provided toothbrushes to NYC-DOC in 2006 falsely
25 designated as Loops Flexbrushes. Nor is there evidence that NYC-DOC was confused
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28 ⁶ Hemming contends that Amercare had "full knowledge and approval of Loops" to submit its 2006 bid to supply Loops Flexbrush toothbrushes.

1 or deceived. In any case, Amercare did not win the 2006 bid and Loops did not suffer
2 injury caused by Amercare's 2006 bid.

3 Alternatively, Loops argues that Defendants' "unfair competitive practices" of
4 soliciting samples of Loops Flexbrushes, copying them, and using the copies to bid
5 against Loops, violate the Lanham Act. (Dkt. #170 at 28). This is unpersuasive.
6
7 When Amercare bid on the NYC-DOC contract in 2007, it offered to provide the
8 Amerfresh toothbrush. The bid documents indicated that Amercare was offering to
9 provide the Amerfresh toothbrush, the toothbrushes were labeled "AmerCare" and the
10 packaging was labeled with "AmerCare." There is no possibility that NYC-DOC was
11 confused regarding the origin of Amercare's toothbrushes. While Loops objects to
12 what it characterizes as the "slavish copying" of its Flexbrush, (*id.*), the Lanham Act
13 offers no protection. As the Supreme Court has stated, "unless an intellectual property
14 right such as a patent or copyright protects an item, it will be subject to copying."
15
16 *Dastar*, 539 U.S. at 33 (quoting *TrafFix Devices, Inc. v. Marketing Displays, Inc.*, 532
17 U.S. 23, 29 (2001)).
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21 **D. Unfair Competition Under Common Law**

22 In its complaint, Loops alleges a claim for "Unfair Competition under Washington
23 Common Law against All Defendants. (Dkt. #41 at 21). In describing this claim, the
24 complaint realleges the facts underlying Loops's other claims and then states, "By committing
25 the above described acts, including but not limited to, palming and/or passing off Plaintiff's
26 goods without authorization and false designation of origin, [Defendants] have violated the
27 common law of unfair competition." (*Id.* at ¶105). To the extent Loops's unfair competition
28 claim is based on palming off, it fails for the same reason its Lanham Act claim fails.

1 Loops argues that its unfair competition claim should not be dismissed because Loops
 2 has met the elements for tortious interference with a business expectancy. Loops did not plead
 3 a claim for tortious interference with a business expectancy and discovery was not conducted
 4 regarding such a claim. It is too late to add the claim now.⁷

5 Since Loops provides no viable argument why its unfair competition claim should be
 6 sustained, summary judgment is granted in favor of Defendants on this claim.

7 8 **E. Fraud**

9 Loops brings a claim for common law fraud. The elements of fraud include: (1) a
 10 representation of an existing fact; (2) materiality; (3) falsity; (4) the speaker's knowledge of the
 11 falsity; (5) intent of the speaker that it should be acted upon by the plaintiff; (6) plaintiff's
 12 ignorance of its falsity; (7) plaintiff's reliance on the truth of the representation; (8) plaintiff's
 13 right to rely upon it; and (9) plaintiff's consequent damages. *Adams v. King County*, 164
 14 Wash. 2d 640, 662 (2008) (citing *Stiley v. Block*, 130 Wash. 2d 486, 505 (1996)); *Turner v.*
 15 *Enders*, 15 Wash. App. 875, 878 (1976). Each element of fraud must be proved by clear,
 16 cogent and convincing evidence. *Stiley*, 130 Wash. 2d at 503.

17 The fraud claim is based on two separate conversations between Hemming and Kayser.
 18 First, Loops claims that Hemming fraudulently induced it to provide samples of its Loops
 19 Flexbrush in January 2006. Second, Loops claims that Hemming fraudulently induced it to
 20 provide samples in January 2007 when Hemming and Kayser were discussing whether Loops
 21 would "give" Amercare its flexible toothbrush contracts. Loops claims that on each occasion
 22 Hemming represented that she wanted samples to examine them and show them to potential
 23 customers in order to evaluate whether Amercare would order the product from Loops for
 24 resale, but her true reason for requesting the samples was to send them to China for copying.

25
 26 ⁷ Even if tortious interference with a business expectancy were properly pled,
 27 the claim fails because Loops cannot show that it had a valid business
 28 expectancy. Loops could not expect to be awarded the 2007 NYC-DOC contract
 unless it placed the lowest bid. See *Broten v. May*, 49 Wash. App. 564, 569
 (1987) (a valid business expectancy requires an existing enforceable contract
 or a relationship between parties contemplating a contract with a reasonable
 expectancy of fruition).

1 Hemming's first request for samples does not support a fraud claim because there is no
2 evidence that Hemming's representation regarding her need for samples was false or that she
3 intended in January 2006 to use the samples to copy the Loops Flexbrush. The evidence shows
4 that Amercare is in the business of providing hygiene items to correctional facilities.
5 Throughout 2006 Amercare purchased floss from Loops and resold it to correctional facilities.
6 Amercare submitted a bid in 2006 to the NYC-DOC representing that it wished to supply the
7 NYC-DOC with the Loops Flexbrush. This evidence is consistent with Hemming's testimony
8 that Amercare wanted to distribute the Loops Flexbrush. That Hemming sent samples for
9 copying a year later in 2007 does not support an inference that Hemming had the intent to do
10 so in 2006 when she made the representation. Fraud requires a false statement of existing fact
11 – the statement must be false at the time it is made. *See, e.g., Stiley*, 130 Wash. 2d at 505-06.
12 As a matter of law, the evidence is insufficient for a jury to find that Hemming's 2006
13 representation constituted fraud.

14 Loops disagrees that Hemming sent samples to China in 2007 and instead contends that
15 she did so in 2006 shortly after requesting samples from Loops the first time. Hemming
16 testified at her deposition that she sent samples to China in April 2007 after Kayser refused to
17 do business with her. It is undisputed based on documents and testimony that the molds for the
18 Amerfresh toothbrush were made in May and June 2007. Loops points to four pieces of
19 evidence to promote its theory that the samples were sent in 2006, but none of them create a
20 genuine dispute of fact.

21 First, Loops points to an interrogatory response in which Hemming admits that she first
22 met Jack Chow, the man who manufactured the copied Amerfresh toothbrush, at a trade show
23 in China in 2006. This, however, does not shed any light on when Hemming sent samples of
24 Loops Flexbrushes to Mr. Lai or Mr. Chow. Second, Loops points to Mr. Kayser's testimony
25 that he attended the same trade show in October 2007, met Mr. Chow, and was informed that
26 Mr. Chow had been manufacturing the Amerfresh toothbrush for over a year. (Dkt. #7-2 at 9-
27 10). This is inadmissible hearsay. Third, Amercare submitted a bid to the NYC-DOC in 2006
28 to provide the Loops Flexbrush. Loops argues that since Amercare was not authorized to

1 distribute the Loops Flexbrush, its bid to provide the toothbrush is evidence that it had already
2 copied it. That inference is unwarranted because it is at least equally plausible that Amercare
3 bid to provide the Loops Flexbrush with the hope that Loops would authorize it to be a
4 distributor.

5 Fourth, Loops contends that Mr. Lai's deposition testimony creates a factual dispute.
6 Mr. Lai initially testified that he had obtained the samples from Hemming before a 2006 trade
7 show. (Lai Deposition p. 29 lines 1-5, Dkt. #215 at 16). However, upon further examination
8 specifically regarding the date of the trade show, Lai testified that he could not remember
9 whether it was a 2006 or 2007 trade show. (Lai Deposition, pp. 34-35, 97, Dkt. #215 at 33).
10 Considering Mr. Lai's deposition testimony as a whole, Lai's lack of memory is insufficient to
11 create a factual dispute.

12 Finally, Loops argues that summary judgment should not be granted because the adverse
13 inference instruction Loops would receive at trial creates a dispute of fact. The adverse
14 inference instruction would explain to the jury that missing documents including e-mails,
15 purchase orders, and invoices between Amercare and its Chinese contacts were lost, withheld,
16 or destroyed by Amercare and the jury may infer that the evidence made unavailable by
17 Amercare would have been unfavorable to it. An adverse inference instruction, "standing
18 alone, is not enough to allow a party who has produced no evidence – or utterly inadequate
19 evidence – in support of a given claim to survive summary judgment." *Kronisch v. United*
20 *States*, 150 F.3d 112, 128 (2d Cir. 1998). However, "at the margin, where the innocent party
21 has produced some (not insubstantial) evidence in support of its claim, the intentional
22 destruction of relevant evidence by the opposing party may push a claim that might not
23 otherwise survive summary judgment over the line." *Id.*; *see also Ritchie v. United States*,
24 451 F.3d 1019, 1025 (9th Cir. 2006) (citing *Kronisch* and expressly adopting the Second
25 Circuit's "careful and balanced approach" to weighing the probative value of destroyed
26 documents). Here, the evidence that Hemming sent samples to China in 2006 is "utterly
27 inadequate." *Kronisch*, 150 F.4d at 128. Loops may not use the adverse inference instruction
28 as a wild card to create a factual dispute where none exists.

1 Hemming's January 2007 request for samples of the Loops Flexbrush also does not
2 support a fraud claim because the ninth element is lacking. Loops must prove "consequent
3 damages," which requires that its claimed damages be caused by the fraud. Hemming's
4 fraudulent representations in January 2007 caused Loops to provide samples to Amercare. But
5 Loops does not seek to recover the de minimis value of the samples; it seeks damages incurred
6 from the copying of its product and the loss of the NYC-DOC contract. Thus, Loops has the
7 burden of proving that but for the fraudulent statements, Amercare would not have copied the
8 Flexbrush. This means Loops must prove that Amercare could not have obtained the Loops
9 Flexbrush from some other means.

10 Loops has produced no evidence to meet this burden. The Loops Flexbrush was for sale
11 in 2006 and 2007. It is likely that Amercare could have purchased a Flexbrush from one of
12 Loops's distributors. It is also likely that Amercare could have obtained a sample from NYC-
13 DOC in early 2007 since NYC-DOC was requesting bids for a Loops Flexbrush or equal.
14 Loops provides no evidence to the contrary.

15 More to the point, in 2007 when the fraudulent statements were made, Amercare already
16 possessed samples of the Flexbrush which it had obtained in 2006. Thus Amercare could have
17 copied the Flexbrush regardless of the 2007 statements. Since causation is lacking, summary
18 judgment must be granted.

19 20 **F. Washington Consumer Protection Act Claim**

21 Washington's Consumer Protection Act ("CPA") provides: "Unfair methods of
22 competition and unfair or deceptive acts or practices in the conduct of any trade or commerce
23 are hereby declared unlawful." RCW 19.86.020. The five elements of a CPA action are: (1)
24 an unfair or deceptive act or practice; (2) in the conduct of trade or commerce; (3) which
25 impacts the public interest; (4) injury to the plaintiffs in their business or property; and (5) a
26 causal link between the unfair or deceptive act and the injury suffered. *Mason v. Mortgage*
27 *America, Inc.*, 114 Wash 2d 842, 852 (1990) (citing *Hangman Ridge Training Stables v. Safeco*
28 *Title Ins. Co.*, 105 Wash 2d 778, 719 (1986)).

1 Loops argues that Defendants engaged in two unfair or deceptive acts or practices: first
 2 “Ms. Hemming solicited Plaintiffs on three separate occasions to engage in acts to deceive the
 3 public by demanding that Plaintiffs give Amercare Plaintiffs’ contracts and/or bids for the sale
 4 of flexible handle toothbrushes;” second, “Ms. Hemming concealed her intentions to copy
 5 Plaintiffs’ toothbrushes in China.” (Dkt. #170 at 30).⁸

6 As to the first allegedly deceptive act, Loops contends that Hemming attempted to
 7 engage Loops in “bid rigging” and “collusion.” These allegations are beyond the scope of this
 8 case. The complaint does not allege that Defendants engaged in bid rigging or collusion or that
 9 they violated any state competitive bidding statutes. Rather, it merely states that “Hemming
 10 requested that [Loops] give Amercare any and all contracts [Loops] had for the sale of these
 11 products to allow Amercare to manage these contracts with [Loops] supplying the product to
 12 Amercare. On behalf of [Loops], Kayser refused Hemming’s request.” (Dkt. #41 at ¶¶ 38,
 13 41). Loops provides no legal or evidentiary support that bid rigging occurred or was
 14 attempted. Even if Amercare had attempted to collude with Loops to do something illegal,
 15 Loops refused any invitation and suffered no injury caused by any invitation.

16 Turning to the second act, Loops contends that Defendants committed an unfair or
 17 deceptive act when Hemming failed to reveal her intention to copy the Loops Flexbrush.
 18 Defendants argue that the claim must be dismissed because Loops cannot show that the
 19 deceptive act impacted the public interest, the third element of a CPA claim.

20 Whether a particular act impacts the public interest is determined by analyzing a variety
 21 of factors that differ depending on whether the transaction was “essentially a consumer
 22 transaction” or “essentially a private dispute.” *Hangman Ridge*, 105 Wash. 2d at 790. The
 23 present dispute arises from a private contract negotiation, not from a business-consumer
 24 relationship and is therefore a private dispute. *See Sign-O-Lite Signs, Inc. v. DeLaurenti*

26 ⁸ Loops’s CPA claim cannot rest on Defendants’ act of copying the Loops
 27 Flexbrush because such a claim would be preempted by federal patent and
 28 copyright laws. *See Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489
 U.S. 141, 167 (1989); *Summit Machine Tool Mfg. Corp. v. Victorc CNC Sys.,*
Inc., 7 F.3d 1434, 1439 (1993). Nor can the claim rest on a theory of
 palming off because no palming off occurred as explained above.

1 *Florists, Inc.*, 64 Wash. App. 553, 562 (1992) (dispute arising from contract to purchase a sign
2 characterized as a private dispute); *Brotten v. May*, 49 Wash. App. 564, 570 (1987) (dispute
3 between competitors was essentially private); *see also Nordstrom, Inc. v. Tampourlos*, 107
4 Wash. 2d 735, 742 (1987) (consumer dispute cases typically involve disputes between a
5 purchaser of goods and a seller or between an individual paying for services and the party
6 rendering them).

7 Where a dispute is “essentially private,” “it may be more difficult to show that the public
8 has an interest in the subject matter. *Michael v. Mosquera-Lacy*, 165 Wash. 2d 595, 605
9 (2009) (*quoting Hangman Ridge*, 105 Wash. 2d at 791). “Ordinarily, a breach of a private
10 contract affecting no one but the parties to the contract is not an act or practice affecting the
11 public interest.” *Hangman Ridge*, 105 Wash. 2d at 791. “It is the likelihood that additional
12 plaintiffs have been or will be injured in exactly the same fashion that changes a factual pattern
13 from a private dispute to one that affects the public interest.” *Michael*, 165 Wash. 2d at 605
14 (*quoting Hangman Ridge*, 105 Wash. 2d at 790). “There must be shown a real and substantial
15 potential for repetition, as opposed to a hypothetical possibility of an isolated unfair or
16 deceptive act’s being repeated.” *Id.* (*quoting Eastlake Constr. Co. v. Hess*, 102 Wash. 2d 30,
17 52 (1984)). The Court evaluates four factors: (1) whether the alleged acts were committed in
18 the course of defendant’s business; (2) whether the defendant advertised to the public in
19 general; (3) whether the defendant actively solicited this particular plaintiff, indicating
20 potential solicitation of others; and (4) whether the plaintiff and defendant have unequal
21 bargaining positions. *Hangman Ridge*, 105 Wash. 2d at 790. These factors are not exclusive,
22 no one factor is dispositive, nor is it necessary that all be present. *Id.* at 791.

23 Here, Hemming’s failure to reveal her intention to copy the Loops Flexbrush occurred in
24 the course of Amercare’s business dealings. It is equally clear that Amercare does not
25 advertise to the public in general. As to the third factor, viewing the evidence in the light most
26 favorable to Plaintiffs, Amercare solicited Loops’ business in January 2006 when Hemming
27 telephoned Kayser requesting price quotations and samples for Loops’s products. Hemming
28 also solicited Kayser in 2007, asking him to “give” Loops’s contracts to Amercare. However,

1 it matters little who initiated contract negotiations. The focus of the third factor is whether
 2 there is “a real and substantial potential” that the alleged deceptive act will be repeated,
 3 causing additional plaintiffs to be “injured in exactly the same fashion.” *Michael*, 165 Wash.
 4 2d at 605. That is not the case here. The deceptive act occurred in the course of a year-long
 5 business relationship between the parties. There is no evidence that Amercare solicited sample
 6 products from others intending to copy the samples. No rational jury could conclude that this
 7 was other than an isolated incident. *Cf. Sign-O-Lite Signs*, 64 Wash. App. at 562-63 (where
 8 defendant routinely made door-to-door “cold calls” to customers and deceived one customer by
 9 lying regarding the contents of a form contract, evidence was sufficient to support jury’s
 10 finding that the public interest was implicated because defendant’s “style of soliciting
 11 business” indicated potential for a substantial portion of the public to be deceived).

12 Loops argues that the fourth factor weighs in its favor because “Defendants are one of
 13 the largest suppliers of dental hygiene products nationwide to correctional institutions . . .
 14 while Plaintiffs offer only [two] niche products . . .” (Dkt. #170 at 31). On the other hand,
 15 Loops is the sole source of the Loops Flexbrush. Amercare could not distribute the Loops
 16 Flexbrush without Loops’s permission. Additionally, once Loops’s patent issued, Amercare
 17 would not only be prevented from distributing the Loops Flexbrush without Loops’s
 18 permission, it could be enjoined from distributing any infringing product. Thus, Loops’s
 19 bargaining power was substantial. In addition, it is worth noting that Loops refused
 20 Amercare’s contract offers, evidencing that it was not at in a substantially inferior position.
 21 Accordingly, the fourth factor is neutral or perhaps weighs against Loops. Since only the first
 22 factor weighs in favor of Loops, the public interest is not implicated in this case.⁹

24
 25 ⁹ While the public interest inquiry is often fact specific and the fact finder
 26 is given latitude to weigh the factors, whether particular conduct gives rise
 27 to a CPA violation is a question of law. *Sing v. Scott*, 134 Wash. 2d 24, 30
 28 (1997). Washington courts regularly decide that the public interest element
 is lacking as a matter of law in private dispute cases even where one or more
 factors weigh in favor of public interest. *See Michael*, 165 Wash. 2d at 605;
Hangman Ridge, 105 Wash. 2d at 794; *Broten*, 49 Wash. App. at 570-71. The
 factors are merely rough “indicia” of effect on the public interest. *Hangman
 Ridge*, 105 Wash. 2d at 791.

1 Loops also argues that the Court can find that the public interest element is satisfied “per
2 se” because Amercare’s conduct constitutes bid rigging in violation of RCW 9.18.120 *et seq.*
3 However, Loops does not point to any “specific legislative declaration” of a public interest.
4 *See Hangman Ridge*, 105 Wash. 2d at 791 (“Unless there is a specific legislative declaration of
5 a public interest, the public interest requirement is not per se satisfied”) (internal quotation
6 omitted). Additionally, as stated above, there is no proof that bid rigging occurred and such
7 claims are outside the scope of this litigation.

8 At base, this case involves a deceptive nondisclosure during contract negotiations
9 between two private companies. The public interest is not implicated. Loops’s CPA claim thus
10 fails as a matter of law.¹⁰

11 12 **G. Defendant Jeffrey Hemming**

13 The only remaining claim against the Amercare Defendants is patent infringement for
14 which only non-monetary remedies are available. There is no evidence that Defendant Jeffrey
15 Hemming participated in infringing Loops’s patents. Indeed, although Jeffrey Hemming is
16 apparently an employee of Amercare, the Court has heard no evidence that he was involved in
17 any of the complained of actions in this suit. Accordingly, this remaining claim is dismissed as
18 to Defendant Jeffrey Hemming.

19 20 **V. CONCLUSION**

21 Defendants’ motion for partial summary judgment is GRANTED. Plaintiffs’ claims for
22 violation of the Lanham Act, fraud, unfair competition, and violation of the Washington CPA
23 are DISMISSED as to the Amercare Defendants. Additionally, Plaintiffs may not recover
24 monetary damages on their claim for patent infringement. Furthermore, all claims against
25 Jeffrey Hemming are dismissed. The only remaining claim with respect to Defendants
26

27 ¹⁰ Although Defendants do not raise the argument, it is apparent that Loops’s
28 CPA claim also fails for the same reason its fraud claim fails. There is no
causal link between Hemming’s concealment of her intent to copy the Loops
Flexbrush and the harm suffered.

1 Amercare and Wendy Hemming is a claim for patent infringement for which only non-
2 monetary relief is available.

3 Having reviewed the relevant pleadings, the declarations and exhibits attached thereto,
4 and the remainder of the record, the Court hereby finds and ORDERS:

5 (1) Defendants Amercare, Wendy Hemming, and Jeffrey Hemming's Motion for
6 Summary Judgment (Dkt. #153) is GRANTED as described above.

7 (2) The Clerk is directed to terminate Jeffrey Hemming from the docket as all claims
8 against him are dismissed.

9 (3) Plaintiff's remaining claim against Amercare and Wendy Hemming is a claim for
10 patent infringement for which only non-monetary relief is available.

11 (4) The Clerk is directed to forward a copy of this Order to all counsel of record.

12
13 DATED this 30th day of July 2010.

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17 RICARDO S. MARTINEZ
18 UNITED STATES DISTRICT JUDGE
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